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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

No. 613

THE ST. REGIS TRIBE OF MOHAWK INDIANS, *Petitioner*,

v.

THE STATE OF NEW YORK, *Respondent*.

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK STATE

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December, 1958.

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The above-named petitioner, by its counsel of record, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of New York State in this cause.

### Opinions Below

The opinion of the Court of Appeals, dated June 25, 1958, is officially reported at 5 N.Y. 2d 24, and is printed in the Appendix to this petition at page 1a, *post.* The opinion of the Appellate Division, Third Department of the state Supreme Court is reported at 5 N.Y. App. Div. 2d 117, and is printed in the Ap-

pendix at page 17a, *post*. The opinion of the state Court of Claims is reported at 4 N.Y. Misc. 2d 110, and is printed in the Appendix at page 24a, *post*.

## Jurisdiction

A motion for reargument was filed with the Court of Appeals on September 13, 1958, and denied on October 16, 1958. The jurisdiction of this Court is invoked under 28 U.S.C., Sections 1257(3) and 2101(c). *United States* v. *Ellicott*, 223 U.S. 524, 539.

## Question Presented

In order to appreciate the significance of the question now submitted to this Court, it should be borne in mind that in the thirteen original states it was the state rather than the United States that succeeded to the sovereign right to pre-empt original Indian title and thus perfect its own right to occupation of the fee. The controlling issue in the instant case as to whether a New York Act of 1856 accomplished such a result depends in turn on the answer to the composite question herewith submitted to this Court as to whether the federal Indian Intercourse Act of 1834 (now ordinarily cited as 25 U.S.C. Sec. 177) applied to the State of New York, and if so whether the New York Act complied with the requirements of the federal Act.

## Statutes Involved

Sec. 12 of the Act of Congress of June 30, 1834, c. 161, 4 Stat. 730, is the most recent of a series of several similar enactments in 1790, 1793, 1799, and 1802, and is still in effect. Over the years, however, it has been the subject of two prima facie "codifications", first as R.S. Sec. 2116, and now as 25 U.S.C. Sec. 177, in both

instances with several inconsequential editorial changes but no substantial change. The text of both the original Sec. 12 and the codified Sec. 177 is set forth in the Appendix at pages 36a, 37a, *post*. Because of supposedly easier and more convenient reference, the original form of this statute is now almost always thus cited and referred to as Sec. 177, e.g., see the first of the three paragraphs of the opinion below which are quoted at page 4, *post*.

Sec. 1 of the Act of Congress of September 13, 1950, 64 Stat. 845, is in the same way ordinarily referred to as 25 U.S.C. Sec. 233, the text of which is set forth at pages 37a, *post*.

The text of Chapter 121 of the New York Session Laws of 1856 is set forth at page 38a, *post*.

**Statement of the Case**

Petitioner is the separate American portion of the St. Regis Tribe of Indians, residing upon its reservation in New York State. It claims that a compensable interest in Barnhart's Island in the St. Lawrence River, held by it under recognized original Indian title which had never been extinguished, was taken in 1954 when the Power Authority of the State of New York, pursuant to a state statute, appropriated that Island for a power project.

Petitioner initiated the instant proceeding in the state Court of Claims, and the present record stems from the State's motion to dismiss which was denied by that Court. The Appellate Division for the Third Judicial Department reversed, and the Court of Appeals in the judgment which is here for review affirmed the judgment of the Appellate Division. The grounds

of the motion, and the opinions of both courts (which are also printed in the Appendix) are sufficiently summarized in the opinion of the Court of Appeals at pages 10a-11a, *post*.

The New York Act of 1856 upon which the State relies as having effected extinguishment of original Indian title, and under which a payment of $5,960 was allegedly made, did not purport to comply with the treaty and federal approval requirements of the federal Indian Intercourse Act. The federal question was squarely raised at the outset in paragraphs 18 and 19 of petitioner's initial claim in the Court of Claims which are set forth in full in the Appendix at page 39a, *post*.

Neither the Court of Claims nor the Appellate Division had occasion to pass on this particular issue. But it could not be avoided by the Court of Appeals after it sustained the state on the factual issue as to the alleged $5,960 payment and held for petitioner on the only other issue which reached it. In the three concluding paragraphs of its opinion (pages 15a-16a, *post*) the Court of Appeals then held—

> "The final point raised by claimants is that even if the 1856 payment be intended as a satisfaction of the claims of the Indians to Barnhart's Island, it cannot effect that result as it is in conflict with the Indian Intercourse Act (Title 25 U.S.C.A., § 177).
>
> "In Seneca Nation v. Christie, 126 N.Y. 122, we stated (p. 142) with regard to that Act:
>
> > 'There is room for question whether the act of 1802 was intended to apply to treaties made by a sovereign State with tribes within the State

for the extinguishment of the Indian title to lands therein, * * *'

"Our language in that case was the basis of a holding in United States v. Franklin County, 50 F. Supp. 1952, to the effect that the provisions of the Indian Intercourse Act do not apply to the State of New York. No authority has been cited to us which would indicate a contrary result.

"In any event, we have here the situation where the State of New York duly negotiated the Treaty of 1796 with the various Indian tribes, including the St. Regis Tribe, in the presence of a Federal commissioner. Thereafter a dispute arose over the meaning and application of the terms of that treaty. Certainly the State had the right to settle this dispute under that treaty through a legislative grant of compensation (see N.Y. State Const., Art. 1, § 13). Thus this was not the negotiation of a new purchase of property from an Indian tribe, but rather the adjustment of a claim that had arisen as the result of the ambiguous language of the 1796 treaty."

and upon these grounds gave judgment for the defendant State of New York.

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So much for the posture of the instant case itself. But this statement would indeed be incomplete without reference to the even *more recent* and *direct conflict* afforded by the decisions of two United States Courts of Appeals. Both decisions involved another of New York's Six Nations and another major project of the same Power Authority of that state.

In *Tuscarora Indians* v. *Power Authority of the State of New York*, 257 F. 2d 885, 893, certiorari

denied October 13, 1958, October Term 1958, No. 384, the Court of Appeals for the Second Circuit held for the Indians on the question with which we are presently concerned—

> "The court below came to the conclusion * * * that neither sections 177 nor 233 of Title 25 U.S.C.A. presented any bar to the exercise of eminent domain [by the State of New York]. The wording of these two statutes does not, in our opinion lead to such a conclusion. However * * *"

The opinion then went on to hold against them, however, on an entirely separate contention of the State as to the controlling effect of certain proceedings under the Federal Power Act. The petition for certiorari dealt almost altogether with this latter issue.

In *Tuscarora Indian Nation* v. *Federal Power Commission, et al.*, F. 2d , November 14, 1958, the United States Court of Appeals for the District of Columbia in the course of direct review of those same proceedings bottomed its entire decision for the Indians on the still all-extensive applicability of Sec. 177 to New York as well as other states. The second paragraph of its opinion is especially in point—

> "The relationship of the United States to the Tuscarora Indians resembles a guardianship, and control over the alienation of their lands is in the United States. A long-existing statute[1] provides: 'No purchase, grant, lease, or other conveyance of lands * * * from *any* Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitu-

"[1] Rev. Stat. § 2116 (1875), 25 U.S.C.A. § 177.

tion.' (Emphasis added.) The point is further made specific in regard to lands within Indian reservations in the State of New York by a statute adopted by the Congress in 1950,[2] which conferred upon the courts of New York jurisdiction of certain actions involving Indians but contained the proviso 'That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York'. The United States Court of Appeals for the Second Circuit held that the lands involved here are protected by that provision.[3] It makes no difference how title to the land may have been acquired by the tribe."

[2] 64 STAT. 845, 25 U.S.C.A. § 233.

[3] Tuscarora Nation of Indians v. Power Authority, 257 F. 2d 885 (1958)."

For a more complete picture of the full significance of this paragraph see the Appendix at page 41a, *post*, where it is set forth in its proper perspective with the preceding and several succeeding paragraphs.

## Reasons for Granting the Writ

I. The outstanding reason why this petition should be granted is that the question which it presents is the crux of a long standing and steadily worsening problem which for more than a century has been of substantial concern and importance both to a large sector of our Indian population and to the responsible authorities of at least one of our great states. This problem has now culminated in a direct conflict between the instant case and contemporary decisions of the two United States Courts of Appeals which have either direct or indirect jurisdiction within that same state, and can only be resolved by an authorita-

tive decision of this Court as to the applicability of a pertinent and "long-existing" Act of Congress.

In New York state alone, where some 6,500 Indians reside upon the 88,000 acres of eight state reservations, the seriousness to Indians and non-Indians alike of still other aspects of that uncertainty is constantly manifesting itself. Right within the past year the 1958 Report of the New York Joint Legislative Committee on Indian Affairs emphasized that

> "The leasing of reservation lands, even for short periods does involve the troublesome question of whether such agreements in the absence of approval by the Federal Government, will be upheld."

After citing 25 U.S.C. Sec. 177 as being the problem confronting the State and limiting it in its own actions with respect to Indian lands the Committee continued—

> "One way or another, it is highly desirable that this lingering uncertainty be removed in order that tribes will not be unduly hampered in deriving valuable rentals, especially in lands within the orbit of the Seaway and Power developments."

*A fortiori* it is all the more important that this lingering uncertainty be dispelled now that the highest state court and the highest federal court in the state have taken diametrically opposite positions. Especially so, since under our dual system of courts any question of the sort referred to by the Legislative Committee might come up in either a state court or a federal court. Or worse yet from the standpoint of orderly judicial procedure, the moving party would have the option to choose his own court.

Senate Report No. 2105, 81st Cong., similarly illustrates both the extent and the seriousness of the confusion which has persisted for more than a century, and which will become even worse confounded if the instant decision of the judicial branch of New York's government stands unreviewed. That Report recommended the passage of H.R. 4942, a bill enactment of which was sought by the *executive* branch of that same state government, and which was eventually approved August 14, 1950, 64 Stat. 442. To summarize the background as briefly as possible, it seems that the greater part of the corporate area of the city of Salamanca is located on leaseholds granted by the Seneca Indians. In the words of Chapter 787, N.Y. Session Laws of 1949—

> "Continuance of the validity of such leases is vital to the city of Salamanca and to its corporate existence"

and the statute proceeded to amend the city charter in great detail with respect to rentals, tax liens, tax sales, etc., in connection with those Indian leases.

Two excerpts from Report No. 2105 are especially in point in the present connection. One is that—

> "Obviously authorization by the Congress was also necessary, and this is the reason for H.R. 4942."

The other is most enlightening on the long history and far flung ramifications of the present question—

> "Beginning about 1850 non-Indian settlers leased reservation lands from the Seneca Indians without approval by the United States. These leases were purportedly ratified by the State of New York, but such ratification was invalidated

> by the New York Supreme Court (unreported decision set out in H. Misc. Doc. No. 75, 43d Cong., 2d sess., 1875). The act of February 19, 1875 (18 Stat. 330), ratified the existing leases for a period of not to exceed 5 years and authorized renewal of the leases for a period of 12 years. The act of September 30, 1890 (26 Stat. 558) authorized renewal of the leases for terms of not exceeding 99 years. All leases of reservation lands made under authority of these acts of Congress will expire on February 19, 1991."

That the applicability of an Act of Congress presents a federal question is self evident. And that the question in the instant case is one of substance and also of importance to both Indians and non-Indians generally is still further confirmed by the appeal from another portion of the judgment in the earlier of the above-mentioned *Tuscarora* cases, which has been filed in this Court by the Attorney General of New York in behalf of the Superintendent of Public Works of that State, and in which no order has yet been entered by this Court. (October Term 1958, No. 386).

In his Jurisdictional Statement, he posed as the first of the two questions presented—

> "(1) Is the exercise of the sovereign power of eminent domain by the State of New York as to Indian reservation lands repugnant to 25 U.S.C. §§ 177 and 233?"

and in support of that appeal, and under the heading "The Questions are Substantial", he summarized the State's concern as follows:

> "The legal questions involved the sovereign power of eminent domain of the State of New York as to Indian lands, as it has been exercised

> for more than a century and a half. The decision of the Court of Appeals for the Second Circuit impugns the validity of hundreds of past and contemporary takings of Indian lands and throws thousands of titles in the State of New York into chaos and confusion."

And in his still more recent—and quite prophetic—brief in opposition to appellee's motion to dismiss or affirm, the Attorney General of New York reiterates the substantial importance of this question to that State at such greater length that space scarcely permits its quotation at this point. For the convenient reference of the Court, however it is set forth in full in the Appendix at page 39a, *post*.

And finally there is still a further aspect of the instant case which enhances its importance as concerns all of New York's Indians. If the present opinion is to be construed as holding that the 1856 state statute conforms with the Act of Congress, and is permitted to stand, a next and very easy step might well be the possibility of abolition of petitioner's or any other state reservation by a mere *ex parte* legislative grant.

II. The conflict between the instant case and the two *Tuscarora* cases is self evident, and it is submitted that in the setting of general importance which has been developed in the preceding pages that conflict is in itself a controlling reason for the granting of this petition.

Especially so as the instant decision is also distinctly *contra* to still other decisions of the federal courts, such as *United States* v. *National Gypsum Co.*, 141 F. 2d 859 (CCA 2), an earlier New York case, and *United States*

v. *7,405.3 Acres of Land*, 97 F. 2d 417 (CCA 4) a North Carolina case. In the *Gypsum* case the Circuit Court of Appeals in holding at page 863 that Sec. 177 had not been contravened necessarily recognized its applicability to New York State—

> "It is not doubted that Congress could make other provisions for the disposition of the lands of the Tonawandas * * *, but until it does so we think that a status so long maintained with the approval of the United States government should be recognized and **is not in contravention of 25 U.S.C.A. § 177.** R.S. § 2116." (Emphasis supplied.)

In the *7,405.3 Acres* case the Circuit Court of Appeals at page 422 based its decision squarely on

> "A statute of the United States [which] expressly forbids the acquisition of lands of any Indian tribe by purchase, grant, lease, or other conveyance, except by treaty or convention and subjects to penalty anyone not being employed under the authority of the United States who attempts to negotiate such treaty. R.S. § 2116, **25 U.S.C.A. § 177."** (Emphasis supplied.)

And inferentially to the same effect although directed primarily to other issues *cf. United States* v. *Candelaria*, 271 U.S. 432, 441, and *Pueblo of Santa Rosa* v. *Fall*, 273 U.S. 315, 320, in both of which this Court emphasized by full quotation the crucial opening sentence of R.S. § 2116 (now 25 U.S.C. § 177) as applicable in the first instance to New Mexico and in the second instance to Arizona. *Cf.* also *Worcester* v. *Georgia*, 6 Pet. 515, in which a statute of that state was considered to be repugnant to the earlier but substantially identical Indian Intercourse Act of 1802. To

quote briefly from the opinion of this Court by Chief Justice Marshall—

> "The treaties and laws of the United States * * * provide that all intercourse with [the Indians] shall be carried on exclusively by the government of the Union." (Page 557)

III. No court, and especially no state court, should assume to set aside so summarily an Act of Congress as inapplicable either *in toto* or in its application to a given case, without a more substantial and adequately explained justification for so doing then is offered by the three brief final paragraphs of the opinion of the New York Court. Indeed it is none too clear whether its judgment was intended to be bottomed on the next to the last of those paragraphs or on the last paragraph. But it matters little, for both paragraphs fall so far short of the above standard as to constitute in itself still further reason for review of a decision which disposes of a matter of the present substance and importance on grounds which when analyzed leave nothing but two stark and wholly unsupported *ipse dixits*. It is fully realized that this is neither the time nor the place to argue the legal merits of the decision below, but the way in which it was reached is something else again, and it is submitted that some analysis thereof is entirely in order at this stage of the case.

(a) *The Seneca case*. The quotation relied upon from that case was *dicta* in its purest form. Reference to the original opinion shows not only that the question so suggested was not explored any further, but that on the contrary the very next sentence announced the decision that—

> "assuming that the statute applies to the transaction of August 31, 1826, we are of opinion that the purchase then made was not in violation of [its] true meaning and effect * * *." (Page 143; and see page 146 to the same effect.)

That some sentence opened up an intensive review of the considerations supporting that conclusion. Especially significant, and in direct conflict with the necessarily implied holding of the instant decision was the following such consideration on the next page 144—

> "The true spirit and intent of the proviso was, we think, **to permit** the state or its agents to enter into a treaty or a convention with an Indian tribe within its borders **for the purchase of a preemptive right**, provided it was entered into in the presence of and with the approval of a commissioner of the United States appointed to attend the same, * * *" (Emphasis supplied.)

(b) *The Franklin County* case. Like the *Seneca* case, the *Franklin County* case assumes *arguendo* that the Federal Act does apply to New York State. For despite some discussion in general terms, a careful analysis of the opinion (see particularly page 156) again discloses neither an issue nor a "holding" to any such broad effect as "that the **provisions** of the Indian Intercourse Act do not apply to the State of New York". On the contrary the issue was very definitely narrowed down to "the practical **construction** placed on the Act by both the State of New York and the United States" (emphasis supplied) **with respect to necessity for the presence of a United States Commissioner.** The court held only that the Act in this respect is directory rather than mandatory, that

> "The Act, by its terms, does not require the presence of a United States Commissioner at a treaty as a prerequisite to its validity"

and that, no fraud being charged, this **"provision"** (note use of the singular) **did not apply to the particular 1824 conveyance that was in issue.**

(c) *No authority to the contrary.* The final sentence in the short paragraph devoted to this major aspect of the case to the effect that

> "No authority has been cited to us which would indicate a contrary result"

is wholly out of place in dealing with such a serious matter as setting aside an Act of Congress as inapplicable to an entire state—and by almost necessary inference to the twelve other original states as well. Especially so where as here the very injection of this pseudo-issue as to Section 177 not being applicable to the State of New York had been wholly gratuitous on the part of the Court itself, and subsequent to the submission of briefs and argument. This petitioner had had neither occasion nor opportunity to argue or cite authorities to the contrary, and its motion to reargue so that such argument, including the supervening *Tuscarora* case at 257 F. 2d 885, could be offered was denied. No case, not even the *Seneca* case (see page 13 *ante*), had so held. Nor had the respondent State itself ever so contended at any stage of the instant case. Indeed, its only references to either *Seneca* or *Franklin County* in its Court of Appeals brief in the instant case had been in support of its entirely different contention as to *construction* of the Indian Intercourse Act to the effect that

> "Nothing in [that Act] made the approbation of a United States Commissioner a prerequisite to the validity of the transaction authorized by L. 1856, ch. 121."

All of which necessarily assumed the applicability of of the Act.

(d) *The treaty of 1796.* To the extent that the decision below is bottomed on the final paragraph of the opinion, the premises on which such a conclusion as is there offered would have to be based are so inaccurately stated as to leave the alleged conclusion utterly unsupported. For if there was any "dispute" over the meaning and application of the Indians' Treaty it was wholly incidental to an international dispute of far greater magnitude. The Indians were mere pawns in a much larger "dispute" which "arose" between the United States and Great Britain, not over the effect of any Indian Treaty of 1796 but rather over the effect of the much earlier 1783 Treaty of Paris at the conclusion of the Revolution, and which was "adjust[ed]", not by any New York State Act of 1856 but by an 1822 decision of an international commission established under the 1814 Treaty of Ghent at the conclusion of the War of 1812. This concluding paragraph of the opinion is completely inconsistent with the summary in its own earlier pages (pages 1a-10a, *post*) of the facts just outlined. Note particularly the two New York State reports to the effect that Barnhardt's Island (the area here in question) "was not ceded to the United States * * * by virtue of the treaty of 1783" but "only became the property of this State by the [1814] treaty of Ghent" (pages 4a-5a, 7a-9a, *post*). Whatever else might be said for the Act of 1856, it certainly cannot

be just brushed off as "the adjustment of a claim that had arisen as the result of the ambiguous language of the 1796 treaty". And then too, if the concluding paragraph of the opinion below is intended as a decision that nevertheless there was conformance with Sec. 177, it leaves unanswered a very pertinent question. How could a federal Commissioner present at the Treaty of 1796 have given federal approbation to a then wholly unanticipated appropriation of Indian lands sixty years later?

For many years the State of New York has admittedly been whittling away all pretense of compliance with either the letter of the spirit of a "long-existing" Act of Congress. And now this present final climactic effort on the part of its highest court calls at the very least for the exercise of this Court's supreme power of review.

WHEREFORE, petitioner prays that a writ of certiorari issue to review the decision of the Court of Appeals of New York State.

Respectfully,

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December, 1958.